UNITED STATES DEPARTMENT OF LABOR • OFFICE OF ADMINISTRATIVE LAW JUDGES

Whistleblower Newsletter

June 1, 2004

U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002
(202) 693-7500
www.oalj.dol.gov

John M. Vittone
Chief Judge

Thomas M. Burke
Associate Chief Judge
for
Black Lung and
Traditional

AIR21 CASES

AUTHORITY OF ALJ ON HER OWN MOTION TO ORDER COMPLAINANT TO SHOW CAUSE WHY COMPLAINT SHOULD NOT BE DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION

In ***Powers v. Paper, Allied-Industrial, Chemical & Energy Workers Int'l Union (PACE)***, 2004-AIR-19 (ALJ May 7, 2004), the ALJ issued a preliminary order and order to show cause directing the Complainant to show cause why her complaint should not be dismissed for failure to state a cause of action under the whistleblower provisions of AIR21, the SOX, and the environmental statutes. In response, the Complainant alleged that the ALJ must first issue a notice of hearing, and only thereafter, on motion of a party, consider whether a summary disposition is appropriate. The ALJ, referencing caselaw interpreting FRCP 12(b)(6), found that "it has been uniformly held that a Court may dismiss a claim for failure to state a claim upon which relief can be granted when it is patently obvious that the claimant could not prevail on the facts as alleged in the complaint. Courts have the inherent power to take such action, or to find that a complaint is frivolous on its face. *See, Koch v. Mirza,* 869 F.Supp. 1031 (W.D.N.Y. 1994); *Washington Petroleum and Supply Co. v. Girard Bank,* 629 F.Supp. 1224 (M.D.Pa. 1983); *Johnson v. Baskerville,* 568 F.Supp. 853 (E.D.Va. 1983); *Cook v. Bates,* 92 F.R.D. 119 (S.D.N.Y. 1981)." The ALJ noted that the relevant inquiry is whether, assuming that all the Complainant's allegations are true, she has stated a cause of action upon which relief can be granted. The ALJ

also noted that she had liberally construed the complaint and not held the *pro se* litigant to the same standard as would be required of an attorney. The Complainant's 36 page complaint, however, only raised issues over which DOL OALJ has no jurisdiction, such as disputes with her union over interpretation of a CBA or a union's duty of representation, whether FAA rules had been violated, the activities of the NLRB, and constitutional rights. The one potential complaint over which DOL OALJ jurisdiction might attach showed no adverse employment action with tangible consequences, it being merely an allegation of a verbal threat of a written warning. The ALJ, therefore, dismissed the complaint.

ERA CASES

[Nuclear and Environmental Whistleblower Digest VIII B 2 a]
ALJ'S CREDIBILITY DETERMINATIONS; ARB NOT REQUIRED TO GIVE SUBSTANTIAL WEIGHT TO ALJ'S DETERMINATION WHERE IT WAS NOT GROUNDED IN DEMEANOR

In ***Jones v. United States Enrichment Corp.***, ARB Nos. 02-093 and 03-010, ALJ No. 2001-ERA-21 (ARB Apr. 30, 2004), the ARB rejected the Complainant's contention that it was required to give substantial weight to his testimony based on the ALJ's finding that the Complainant was more credible that the Complainant's manager, where the ALJ's credibility determination was not grounded in demeanor but on the ALJ's finding that the manager was wrongly blaming the Complainant for the manger's own managerial deficiencies.

[Nuclear and Environmental Whistleblower Digest IX D 3]
RECONSIDERATION; AUTHORITY OF ARB; PETITION FOR EN BANC RECONSIDERATION TREATED AS MOTION FOR RECONSIDERATION BY ORIGINAL PANEL

The Board has authority to reconsider its decisions arising under the ERA. ***Kelly v. Lambda Research, Inc.***, ARB No. 02-075, ALJ No. 2000-ERA-35 (ARB May 6, 2004), citing *Macktal v. Brown and Root, Inc*., ARB Nos. 98-112, 98-112A, ALJ No. 1986-ERA-23, Order Granting Reconsideration (ARB Nov. 20, 1998). In *Kelly*, the Complainant petitioned for reconsideration *en banc*. The matter, however, was not considered *en banc*, but by the panel that originally decided the case.

[Nuclear and Environmental Whistleblower Digest XII D 6]
PROTECTED ACTIVITY; BAD MANAGEMENT IS NOT ACTIONABLE

In ***Jones v. United States Enrichment Corp.***, ARB Nos. 02-093 and 03-010, ALJ No. 2001-ERA-21 (ARB Apr. 30, 2004), the ALJ had found that inadequacies in the quality of supervision received by the Complainant were discriminatory. The ARB, however, held that "[b]ad management . . . is not actionable under the ERA whistleblower protection provision. *Accord Jenkins v. United States Envtl. Prot.* Agency, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 40-41 (ARB Feb. 28, 2003). The whistleblower protection provision addresses only discrimination motivated by protected conduct." USDOL/OALJ Reporter at 13. The Board concluded that even if, as the Complainant alleged, his supervisors did not properly train him, shunned him

and unfairly evaluated him in a process to decide which of two employees would be riffed, the Complainant failed to prove by a preponderance of the evidence that the managers retaliated because of his protected activity. The Board wrote: "That [the Respondent's] reason for terminating [the Complainant's] employment might be unpersuasive or even 'obviously contrived' does not mean that [the Complainant's] succeeds here. 'It is not enough . . . to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination.' *St. Mary's Honor Center,* 509 U.S. at 519, 524. *See also Gale v. Ocean Imaging and Ocean Resources, Inc.,* ARB No. 98-143, ALJ No. 1997-ERA-38, slip op. at 13 (ARB July 31, 2002) (We are not a 'super-personnel department that reexamines an entity's business decisions,' citing *Morrow v. Wal-Mart Stores, Inc.,* 152 F. 3d 559, 564 (7th Cir. 1998))."

ENVIRONMENTAL CASES

[Nuclear and Environmental Whistleblower Digest III C 1]
TIMELINESS OF COMPLAINT; CONTINUING VIOLATION THEORY WAIVED ON APPEAL IF NOT RAISED BEFORE THE ALJ

Even though ARB review of a ALJ decision under the environmental whistleblower laws is *de novo*, where the Complainant did not raise a contention that all of the alleged adverse actions occurring before the 30 day limitations period should be considered timely based on a continuing violation theory until review before the ARB, the Board found that the issue had been waived on appeal. ***Schlagel v. Dow Corning Corp.***, ARB No. 02-092, ALJ No. 2001-CER-1 (ARB Apr. 30, 2004).

[Nuclear and Environmental Whistleblower Digest III C 1]
TIMELINESS OF COMPLAINT; CONTINUING VIOLATION DOCTRINE; DISCRETE EVENTS

The continuing violation doctrine is not available for discrete acts. ***Schlagel v. Dow Corning Corp.***, ARB No. 02-092, ALJ No. 2001-CER-1 (ARB Apr. 30, 2004), citing *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113-15 (2002).

See also ***Jones v. United States Enrichment Corp.***, ARB Nos. 02-093 and 03-010, ALJ No. 2001-ERA-21 (ARB Apr. 30, 2004) (ALJ erred in making findings that three discrete events occurring before the limitations period violated the ERA; even if they were adverse to the Complainant, they were not actionable).

But also see Schlagel, supra, holding that although not actionable, the ALJ properly admitted evidence of otherwise time-barred alleged adverse actions and fully considered them as relevant evidence probative of the Respondent's decision making process regarding the actionable adverse actions occurring within the limitations period.

[Nuclear and Environmental Whistleblower Digest III C 4]
TIMELINESS OF COMPLAINT; HOSTILE WORK ENVIRONMENT; ELEMENTS

In ***Schlagel v. Dow Corning Corp.***, ARB No. 02-092, ALJ No. 2001-CER-1 (ARB Apr. 30, 2004), citing *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113-15 (2002), the ARB reviewed the elements of a claim that a hostile work environment rendered all adverse employment actions, including those occurring prior to the 30 day limitations period, actionable.

The Board summarized the Supreme Court ruling in *Morgan*, stating that "[i]n contrast to discrete adverse actions, a hostile work environment occurs over a series of days, or perhaps years, and a single act of harassment may not be actionable on its own. Hostile work environment claims are based on the cumulative effect of individual acts. ... A complaint alleging hostile work environment is not time-barred if all the acts comprising the claim are part of the same practice and at least one act comes within the thirty-day filing period." *Schlagel*, USDOL/OALJ Reporter at 10 (citations omitted). Thus, if the Complainant "were able to show that at least one act comprising the hostile work environment occurred within thirty days prior to filing his complaint, his entire hostile work environment cause of action would be deemed timely and he could proceed to litigate the merits." To establish a hostile work environment, a complainant has to prove that:

> 1) he engaged in protected activity;
>
> 2) he suffered intentional harassment related to that activity;
>
> 3) the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment; and
>
> 4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect the complainant.

USDOL/OALJ Reporter at 10-11 (citations omitted).

In the case *sub judice*, the Board rejected the Complainant's hostile work environment claim for rendering pre-limitations period actions timely because he had not addressed or shown that the Respondent's allegedly adverse employment actions were in violation of elements 3 and 4.

Although not actionable, however, the ALJ properly admitted evidence of otherwise time-barred alleged adverse actions and fully considered them as relevant evidence probative of the Respondent's decision making process regarding the actionable adverse actions occurring within the limitations period.

[Nuclear and Environmental Whistleblower Digest VI B]
FAILURE TO SERVE COPY OF REQUEST FOR HEARING ON THE RESPONDENT

In ***Shirani v. Calvert Cliffs Nuclear Power Plant, Inc.***, 2004-ERA-9 (ALJ Apr. 29, 2004), the ALJ held that the Complainant's failure to serve the Respondent with a

copy of his request for a hearing in violation of 29 C.F.R. § 24.4(d)(2) and (d)(3) deprived her of jurisdiction over the matter, notwithstanding that OSHA's determination letter did not mention this requirement. The ALJ noted her agreement in this respect with the ALJ decisions in *Webb v. Numanco, LLC*, 1998-ERA-29 (ALJ July 17, 1998), *vacated on other grounds Webb v. Numanco, LLC*, 1998-ERA-27 and 28 (ARB Jan. 29, 1999) and *Cruver v. Burns In't*, 2001-ERA-31 (ALJ Dec. 5, 2001).

[Editor's note: In *Hibler v. Exelon Nuclear Generating Co., LLC*, 2003-ERA-9 (ALJ May 5, 2003), the ALJ denied a motion to dismiss on this ground, expressing disagreement with *Webb* and *Cruver*. In *Hibler v. Exelon Nuclear Generating Co., LLC*, 2003-ERA-9 (ALJ June 4, 2003), the ALJ certified this issue to the ARB. In *Hibler v. Exelon Generation Co., LLC*, ARB No. 03-106, ALJ No. 2003-ERA-9 (ARB Feb. 26, 2004), however, the ARB denied the request for interlocutory appeal.]

[Nuclear and Environmental Whistleblower Digest VIII B 2 c]
TIMELINESS OF COMPLAINT; CONTINUING VIOLATION THEORY WAIVED ON APPEAL IF NOT RAISED BEFORE THE ALJ

Even though ARB review of a ALJ decision under the environmental whistleblower laws is *de novo*, where the Complainant did not raise a contention that all of the alleged adverse actions occurring before the 30 day limitations period should be considered timely based on a continuing violation theory until review before the ARB, the Board found that the issue had been waived on appeal. ***Schlagel v. Dow Corning Corp.***, ARB No. 02-092, ALJ No. 2001-CER-1 (ARB Apr. 30, 2004).

[Nuclear and Environmental Whistleblower Digest VIII B 3]
INTERLOCUTORY APPEAL; ALJ'S DECISION TO DISQUALIFY HIMSELF

In ***Erickson v. U.S. Environmental Protection Agency, Region 4***, ARB No. 04-071, ALJ No. 2004-CAA-7 (ARB Apr. 30, 2004), the ARB denied the Complainant's petition for interlocutory appeal of an ALJ's decision to disqualify himself from hearing the Complainant's most recent appeal. The ALJ had held in favor of the Complainant in two previous cases, and the Respondent filed a motion to recuse, arguing that the ALJ was biased in favor of the Complainant. The ALJ explicitly rejected the alleged bias ground for recusal, but nonetheless disqualified himself for personal health reasons. The ARB held that "the question of whether or not an administrative law judge should have disqualified himself is reviewable on appeal with the decision on the merits issued by an administrative law judge. . . . Consequently, an order of recusal, like that issued by the ALJ on March 16, 2004, does not qualify for immediate review under the collateral order exception to the *Cohen* finality doctrine." Slip op. at 3 (citation omitted).

[Nuclear and Environmental Whistleblower Digest X P]
METHOD OF ANALYSIS; ASSUMING THAT CERTAIN ELEMENTS OF COMPLAINT ESTABLISHED WHEN OTHER ELEMENT IS DISPOSITIVE

In ***Schlagel v. Dow Corning Corp.***, ARB No. 02-092, ALJ No. 2001-CER-1 (ARB Apr. 30, 2004), the ARB assumed for purposes of weighing the merits of the Complainant's complaint, that a certain action of the Complainant was protected activity and that a certain action of the Respondent was adverse employment action.

These assumptions permitted the ARB to avoid extended discussion of those issues and to focus its analysis on the ultimate question of whether the Complainant proved that the Respondent discriminated against him because of his protected activity. The Board found that the Respondent had presented legitimate non-discriminatory reasons for the adverse employment actions and that the Complainant had not shown by a preponderance of the evidence that these reasons were pretext.

To the same effect ***Jones v. United States Enrichment Corp.***, ARB Nos. 02-093 and 03-010, ALJ No. 2001-ERA-21 (ARB Apr. 30, 2004) (ARB assumes, without finding, that the Complainant engaged in protected activity where it decided the case on the ground that the Complainant had failed to establish that his protected activity contributed to the decision to termination his employment).

[Nuclear and Environmental Whistleblower Digest XI A]

BURDEN OF PRODUCTION AND PROOF IS DIFFERENT IN ENVIRONMENTAL WHISTLEBLOWER CASES AS OPPOSED TO ERA WHISTLEBLOWER CASES WHERE THE EMPLOYER'S BURDEN IN HIGHER IN SOME RESPECTS

In ***Schlagel v. Dow Corning Corp.***, ARB No. 02-092, ALJ No. 2001-CER-1 (ARB Apr. 30, 2004), the ARB summarized the respective burdens of production and proof under the whistleblower provisions of the environmental statutes, as opposed to the whistleblower provision of the ERA:

> To establish a prima facie case of unlawful discrimination under the environmental whistleblower statutes, a complainant needs only to present evidence sufficient to raise an inference, a rebuttable presumption, of discrimination. As the Secretary and the Board have noted, a preponderance of the evidence is not required. *See Williams v. Baltimore City Pub. Schools Sys.*, ARB No. 01-021, ALJ No. 00-CAA-15, slip op. at 1 n. 7 (ARB May 30, 2003). A complainant meets this burden by initially showing that the employer is subject to the applicable whistleblower statutes, that the complainant engaged in protected activity under the statute of which the employer was aware, that the complainant suffered adverse employment action and that a nexus existed between the protected activity and the adverse action. *See Jenkins*, slip op. at 16-17; *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 933-934 (11th Cir. 1995); *Simon v. Simmons Foods, Inc.,* 49 F.3d 386, 389 (8th Cir. 1995). Contrary to the ALJ's characterization, once a complainant meets his initial burden of establishing a prima facie case, the burden then shifts to the employer to simply produce evidence or articulate that it took adverse action for a legitimate, nondiscriminatory reason (a burden of production, as opposed to a burden of proof). When the respondent produces evidence that the complainant was subjected to adverse action for a legitimate, nondiscriminatory reason, the rebuttable presumption created by the complainant's prima facie showing "drops from the case." *Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 255 n.10 (1981). At that point, the inference of discrimination disappears, leaving the complainant to prove intentional discrimination by a preponderance of the evidence. *Jenkins*, slip op. at 18. *Cf. Reeves v.*

Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Thus, after a whistleblower case has been fully tried on the merits, the ALJ does not determine whether a prima facie showing has been established, but rather whether the complainant has proved by a preponderance of the evidence that the respondent discriminated because of protected activity. *Williams*, slip op. at 1 n. 7; *Jenkins*, slip op. at 16-17.

> If the complainant proves by a preponderance of the evidence that a retaliatory or discriminatory motive played at least some role in the respondent's decision to take an adverse action, only then does the burden of proof shift to the respondent employer to prove an affirmative defense and show that the complainant employee would have been fired even if the employee had not engaged in protected activity. *Lockert*, 867 F.2d at 519 n. 2. ...[W]hile Congress has specifically placed a higher burden on the employer in an ERA case in such circumstances, i.e., to demonstrate by "clear and convincing" evidence that it would have nevertheless taken the same action, *see* 42 U.S.C.A. § 5851(b)(3)(D), it has not done so with respect to employers under the CERCLA, TSCA or CAA. Under these environmental whistleblower statutes, the employer may meet that burden by only a preponderance of the evidence. *See Cox v. Lockheed Martin Energy Sys., Inc.*, ARB No. 99-040, ALJ No. 97-ERA-17, slip op. at 4 n.7 (ARB Mar. 30, 2001).

[Nuclear and Environmental Whistleblower Digest XI C 2 b]

LEGITIMATE NON-DISCRIMINATORY REASONS FOR ADVERSE ACTION; PRETEXT NOT SHOWN

In ***Schlagel v. Dow Corning Corp.***, ARB No. 02-092, ALJ No. 2001-CER-1 (ARB Apr. 30, 2004), the ARB reviewed the evidence and found that the Complainant failed to establish by preponderance of the evidence that the Respondent had discriminated against him by transferring, suspending and ultimately firing the Complainant where the record showed

> -- that employees were encouraged to raise environmental issues and concerns, and that that the Complainant's concerns had been investigated and either been addressed and resolved or proven to be unfounded;
>
> -- that, although that Complainant's technical engineering skills were respected, performance appraisals (including one prior to his protected activity) noted a need to improve leadership skills;
>
> -- that Complainant was offered a new position because an upcoming reduction in production made it impossible for the Complainant to stay in his manufacturing position, and testimony indicated that the new position was a good fit for the Complainant and was not a demotion;

-- that the Complainant was justifiably suspended when he sent an e-mail to the Respondent's CEO stating that he had been bullied into the job and later sent an e-mail to everyone at the facility (including non-employee contractors) disparaging his potential supervisor.

-- that the e-mail to the entire work force attached confidential information and caused disruption at the plant requiring the plant manager to explain to the workers that the safety and environmental concerns had already been investigated and resolved.

[Nuclear and Environmental Whistleblower Digest XII C 4]
PROTECTED ACTIVITY; AFTER THE RESPONDENT HAS ADDRESSED THE ENVIRONMENTAL CONCERNS RAISED BY THE COMPLAINANT, THE COMPLAINANT'S RAISING THOSE SAME CONCERNS AGAIN MAY NOT BE PROTECTED ACTIVITY

In ***Schlagel v. Dow Corning Corp.***, ARB No. 02-092, ALJ No. 2001-CER-1 (ARB Apr. 30, 2004), the ARB assumed for purposes of weighing the merits of the Complainant's complaint that an e-mail sent by the Complainant to everyone at the facility at which he was employed was protected activity, even though the ALJ had concluded that it was not, where the Board found it more expeditious to decide the case on other grounds (also, the Complainant had established several other protected activities). The Board, however, noted that at the time he sent the e-mail, the Respondent had already investigated the Complainant's safety and environmental concerns and complaints. Thus, "a viable argument may be raised that [the Complainant's] attachment of [prior e-mails in which he had raised safety concerns] to [the later, post investigation e-mails] was not protected, since [the Complainant] would seemingly no longer have a reasonable, good faith belief that [the Respondent] had not addressed the safety and environmental hazards he raised." USDOL/OALJ Reporter at n.5 (citations omitted).

[Nuclear and Environmental Whistleblower Digest XIV B 2]
LIABILITY OF INDIVIDUALS; MUST BE EMPLOYMENT RELATIONSHIP

In ***Fox v. U.S. Environmental Protection Agency***, 2004-CAA-4 (ALJ Mar. 17, 2004), the ALJ dismissed eight named individuals as Respondents based on *Bath v. United States Nuclear Regulatory Commission*, ARB No. 02-041, ALJ No. 2001-ERA-41 (ARB Sept. 29, 2003) and *Lewis v. Synagro Technologies, Inc.*, ARB No. 02-072, ALJ No. 2002-CAA-12 (ARB Feb. 27, 2004), where the Complainant failed to establish in response to the ALJ's order to show cause "that anyone other than her actual employer controlled the terms, conditions and privileges of her employment." The ALJ noted that "[i]n fact, only her employer can provide to Complainant the affirmative relief she seeks ...."

[Nuclear & Environmental Whistleblower Digest XX E]

STATE SOVEREIGN IMMUNITY; TOO LATE FOR OSHA TO INTERVENE ONCE THE CASE IS BEFORE THE ARB

In ***Migliore v. Rhode Island Dept. of Environmental Management***, ARB No. 99-118, ALJ No. 1998-SWD-3 (ARB Apr. 30, 2004), the ARB had issued an order permitting the Assistant Secretary to file a motion to intervene to avoid the bar of state sovereign immunity, and in response the Respondent filed a motion in Federal district court to enforce an earlier injunction. In *State of Rhode Island v. United States*, 301 F.Supp.2d 151 (D.R.I. 2004) (case below 1998-SWD-3), the court held that the intervention of the Secretary to Labor [i.e., OSHA] removes the state sovereign immunity bar of agency adjudication of a case brought by a private citizen against a nonconsenting state "only if it occurs at or before the ALJ stage. Intervention at the ARB stage is too little and too late." Thus, the ARB dismissed the proceedings before it and vacated the ALJ's recommended decision and order in favor of the Complainant.

SOX CASES

ARB REVIEW; TIME PERIOD FOR ARB REVIEW IS DIRECTORY AND NOT JURISDICTIONAL

In ***Welch v. Cardinal Bankshares Corp.***, ARB No. 04-054, ALJ No. 2003-SOX-15 (ARB May 13, 2004), the ARB held that the 120-day period stated in the regulations for it to issue a final decision was directory and not jurisdictional.

COVERED EMPLOYEE; EMPLOYEE OF SUBSIDIARY OF PUBLICLY TRADED COMPANY; WHERE THE SUBSIDIARY WAS A MERE INSTRUMENTALITY OF THE PARENT COMPANY

In ***Platone v. Atlantic Coast Airlines***, 2003-SOX-27 (ALJ Apr. 30, 2004), the ALJ found that the Complainant was a covered employee under the whistleblower provision of the Sarbanes-Oxley Act, although she worked for a non-publicly traded subsidiary, where the publicly-traded parent holding company controlled the subsidiary to such a degree as to make it a mere instrumentality of the parent company.

DUAL MOTIVE; ARTICULATION OF LEGITIMATE, NONDISCRIMINATORY MOTIVE DOES NOT END ANALYSIS WHERE COMPLAINANT HAD ESTABLISHED THAT HER PROTECTED ACTIVITY WAS A CONTRIBUTING FACTOR IN HER DISCHARGE

In ***Platone v. Atlantic Coast Airlines***, 2003-SOX-27 (ALJ Apr. 30, 2004), the ALJ found that the Respondent had articulated a legitimate, nondiscriminatory reason for terminating the Complainant's employment -- that the Complainant, who was in a trust position as Manager of Labor Relations, had failed to disclose a romantic relationship with a former union official. However, since the Complainant had proved that her protected activity of reporting her reasonable belief that there had been a pattern of improper flight loss payments to employees (a means of paying

employees who missed flight assignments to perform official union functions) was a contributing factor in her discharge, the dual or mixed motive analysis required that the Respondent establish by clear and convincing evidence that the adverse employment action would have been taken on the basis of the legitimate motive alone. The ALJ, weighing the evidence of record, found that the Complainant's immediate supervisor had initiated the process that resulted in the Complainant's suspension and termination in order to remove what he perceived to be an obstacle to successful cost-cutting concessionary negotiations with the union, i.e., making too much noise about apparently improper flight loss payments.

EMPLOYER'S KNOWLEDGE; CONSTRUCTIVE KNOWLEDGE WHERE IMMEDIATE SUPERVISOR, WHO HAD KNOWLEDGE OF THE COMPLAINANT'S PROTECTED ACTIVITY, FOUND TO HAVE "PLANTED THE SEED" FOR THE COMPLAINANT'S SUSPENSION

In ***Platone v. Atlantic Coast Airlines***, 2003-SOX-27 (ALJ Apr. 30, 2004), the ALJ found that the Respondent was constructively aware of the Complainant's protected activity under the whistleblower provision of the Sarbanes-Oxley Act, even though the official who made the ultimate decision to terminate the Complainant's employment was not aware of the Complainant's protected activity. The ALJ found that the Complainant's immediate supervisor was aware of her protected activity and had " planted the seeds for the Complainant's dismissal, being careful not to taint any other person among the group that debated [the Complainant's] fate with any knowledge of her protected activities." The ALJ found that the supervisor had "actively participated in the discussions and decisionmaking regarding the Complainant's future employment" and that under such circumstances, "it is appropriate to attribute constructive knowledge of the Complainant's protected activity to the ultimate decision-makers." Slip op. at 26.

INTERLOCUTORY APPEAL; ALJ ERROR IN PLACING NOTICE OF APPEAL RIGHTS ON MERITS DECISION IN BIFURCATED PROCEEDING WHERE DAMAGES WERE STILL TO BE LITIGATED

In ***Welch v. Cardinal Bankshares Corp.***, ARB No. 04-054, ALJ No. 2003-SOX-15 (ARB May 13, 2004), the ALJ had issued a Recommended Decision and Order on January 29, 2004 in favor of the Complainant on the merits of the complaint, but reserved for further adjudication the question of damages. Because the ALJ had inadvertently placed a Notice of Appeal Rights on the R D & O, he issued an erratum on February 3, 2004 stating that the R D & O had not been intended to be a final appealable order and ordering that the Notice of Appeal Rights be deleted from the R D & O. On February 3, 2004, the Respondent filed a petition for review with the Board, and the Board issued a Notice of Appeal on February 6, 2004. The Complainant filed a motion to dismiss the appeal as premature or to hold it in abeyance until a final judgment was issued by the ALJ. The Respondent opposed dismissal of the appeal.

The ARB held that because the ALJ had not yet fully disposed on the case, the appeal was interlocutory. The Respondent argued that a "decision of the administrative law judge" is subject to immediate review under 29 C.F.R. § 1980.110(a). The ARB, however, rejected this contention as ignoring section 1980.110(c), the ALJ's

erratum, and ARB precedent about interlocutory appeals. The Respondent argued that the Board's Notice of Appeal cause the ALJ's decision to be irrevocably "vacated." The ARB, however, found no support for the assertion that it could not correct a premature acceptance of a petition for review, and noted that section 1980.110(b) only states that the ALJ's decision becomes "inoperative" and not vacated when the Board accepts the case.

The Board also rejected the Respondent's contention that it would be prejudiced if the ARB refused to hear the case now based on the regulatory 120-day period for ARB review -- the Board holding that the review period had not yet begun to run, and that that 120-day period was directory and not jurisdictional.

PROTECTED ACTIVITY; COMPLAINANT'S REPORT OF APPARENTLY FRAUDLENT UNION DUTY CLAIMS BY UNION OFFICIALS WHICH IMPACTED ON RESPONDENT'S BOTTOM LINE

In ***Platone v. Atlantic Coast Airlines***, 2003-SOX-27 (ALJ Apr. 30, 2004), the ALJ found that the Complainant was engaged in protected activity under the whistleblower provision of the Sarbanes-Oxley Act where she reported suspicions to her supervisor that the company, a regional air carrier, was complicit in a scheme to permit pilots to fraudulently make flight loss claims (the process whereby pilots were reimbursed for being called away from flight duties to attend to official union business). Essentially, the Complainant believed that the company looked the other way in regard to apparent misuse of flight loss claims filed by union officials in order to gain leverage in upcoming contract negotiations where the pilots were going to be asked to make significant concessions because of post-911 financial woes. The ALJ found that "[s]uch a scheme, by its very nature, would involve the use of the mail and wires, and could constitute fraud on ... shareholders." The ALJ noted that the cost of the claims cost the employer between $20,000 and $25,000 a month.

REINSTATEMENT ORDER; BIFURCATED PROCEEDING ON MERITS AND DAMAGES; ALJ SHOULD NOT ISSUE REINSTATEMENT ORDER UNTIL MATTER BECOMES APPEALABLE

Where the ALJ conducts a bifurcated proceeding first adjudicating the merits, and then the damages if the complaint is found to be meritorious, the ALJ should not issue the preliminary order of reinstatement until he or she issues the final appealable order. *See* ***Welch v. Cardinal Bankshares Corp.***, ARB No. 04-054, ALJ No. 2003-SOX-15 (ARB May 13, 2004) (Respondent argued that if it could not immediately appeal the ALJ's merits decision, it would be in an untenable position as the ALJ ordered reinstatement; the ARB noted, however, that the ALJ apparently had only found the Complainant entitled to reinstatement, and appropriately had not yet issued a preliminary order of reinstatement).